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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184213
Party	Plaintiff Galaxy Metal Gear, Inc.
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Date	02/19/2010
Attachments	rebuttal testimony wang.pdf ( 40 pages )(1097486 bytes )

1  
2 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
3 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD  
4

5 In the matter of Application Serial No.: 78914975

6 Filed: 6/22/2006

7 Mark: METAL GEAR  
8

9 GALAXY METAL GEAR, INC., )

10 Opposer, )

11 vs. )

) Opposition No. 91184213

12 DIRECT ACCESS TECHNOLOGY, INC., )

13 Applicant. )

) Action filed: May 20, 2008  
14  
15  
16  
17

18 DEPOSITION OF PATRICK WANG

19 Wednesday, December 9, 2009

20 Pasadena, California  
21  
22  
23

24 REPORTED BY: Lyn Corrin Aaker, CSR No. 6228  
25

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5 Filed: 6/22/2006

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7 GALAXY METAL GEAR, INC., )  
8 )  
9 Opposer, )  
10 vs. )Opposition No. 91184213  
11 )  
12 DIRECT ACCESS TECHNOLOGY, INC., )  
13 )Action filed: May 20, 2008  
14 Applicant. )  
15 )

16 Deposition of PATRICK WANG, an Applicant, taken  
17 on behalf of the Opposer, at 80 South Lake  
18 Avenue, Suite 708, Pasadena, California 91101,  
19 commencing at the hour of 10:07 a.m., Wednesday,  
20 December 9, 2009, before Lyn Corrin Aaker, CSR  
21 No. 6228, pursuant to Notice of Taking  
22 Deposition.  
23  
24  
25

1 APPEARANCES OF COUNSEL:

2

3 For Opposer:

4 WORLDDESQUIRE LAW FIRM  
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8 For Applicant:

9 LAW OFFICE OF MICHAEL C. OLSON  
10 BY: MICHAEL C. OLSON  
11 Attorney at Law  
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Suite 270  
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(949) 442-8940

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I N D E X

WITNESS	EXAMINATION	PAGE
PATRICK WANG	By Mr. Lee	5
	By Mr. Olson	14
	By Mr. Lee	18

EXHIBITS FOR IDENTIFICATION

Opposer's 8	Copy of "Declaration of Patrick Wang in Support of Motion for Summary Judgment"; 4 pages	8
Opposer's 9	Copy of "Cross-Complaint"; 13 pages	12
Opposer's 10	Copy of diagram	14

1 WEDNESDAY, DECEMBER 9, 2009, PASADENA, CALIFORNIA

2 10:07 A.M.

3 \* \* \*

4

5 PATRICK WANG,

6 the witness herein, having been first duly sworn, was

7 examined and testified as follows:

8

9 EXAMINATION +

10 BY MR. LEE:

11 Q. All right. Mr. Wang?

12 A. Yes.

13 Q. Would you please state your name on the record.

14 A. Patrick Wang.

15 Q. And we are here for the TTAB proceeding, and this  
16 is the final stretch. We're in the rebuttal portion, so I  
17 don't think I need to repeat all the rules again. Is that  
18 okay with you?

19 A. Yes, that's fine.

20 Q. I will use DAT to refer to Direct Access  
21 Technology. Is that okay?

22 A. All right.

23 Q. It is DAT's contention that it has Metal Gear  
24 trademark right as common law right in the United States.

25 Is that correct?

1           A.    Yes.

2           Q.    Let me show you previously marked Exhibit No. 2.  
3           We don't have to mark it today.  It's already on our  
4           record.

5           A.    Okay.

6           Q.    We are talking about this Metal Gear as shown on  
7           Exhibit No. 2 that's the subject of this TTAB proceeding.  
8           Are we on the same page?

9           A.    Right.

10          Q.    And it is your contention that DAT started using  
11          Metal Gear mark at least as early as May of 2003?

12          A.    You mean first sale or first making the product?  
13          You need to specify.

14          Q.    Okay.  First using that Metal Gear mark on the  
15          product enclosure in the United States.

16          A.    First sales in May 2003, yes.

17          Q.    And if the date is correct, it would be May 14th  
18          according to this?

19          A.    Okay.

20          Q.    But let's just say it's May of 2003.

21          A.    Okay.

22          Q.    And for the enclosure product as stated here on  
23          Exhibit 2, enclosures for external computer hard drive,  
24          DAT obtained those enclosures -- when those were sold in  
25          the United States in May of 2003, DAT obtained those from

1 DataStor?

2 A. Can you rephrase your question? Because we buy  
3 from other people as well.

4 Q. I'm asking when you claim DAT first used the  
5 Metal Gear mark in May of 2003, claiming the Metal Gear  
6 trademark right, for these products, the enclosures, DAT  
7 purchased from DataStor, D-a-t-a-s-t-o-r without "e." Is  
8 that correct?

9 A. Yes.

10 Q. So for DAT to claim that it has common law  
11 trademark right on Metal Gear used on enclosure at least  
12 as early as May of 2003, that means no other parties would  
13 have the right to use Metal Gear trademark on enclosure in  
14 the United States. Is that a correct statement?

15 MR. OLSON: I'm going to object that no  
16 foundation, calls for a legal opinion.

17 BY MR. LEE:

18 Q. Answer if you can.

19 A. Do I need to answer?

20 MR. OLSON: If you understand the question and  
21 you can give a legal opinion.

22 THE WITNESS: No, I can't.

23 BY MR. LEE:

24 Q. After May of 2003 would DAT consider other  
25 parties selling Metal Gear enclosures in the United States



1 as infringers?

2 A. Yes.

3 MR. LEE: We are going to mark this as Exhibit  
4 No. 8.

5 (A copy of the aforementioned document was  
6 marked by the court reporter as Opposer's  
7 Exhibit+ 8 for identification; attached hereto.)

8 BY MR. LEE:

9 Q. I will just direct your attention to Paragraph 3.  
10 This is the declaration you submitted in support of a  
11 prior motion for summary judgment in this TTAB proceeding.  
12 And I will just direct your attention to Paragraph 3.

13 A. (Witness peruses document.)

14 Okay.

15 Q. Everything is correct in Paragraph No. 3?

16 A. Yes.

17 Q. And top of Page 3 when it says Exhibit A, it  
18 means that Gary Chen e-mail. Do you need to look at that  
19 e-mail, or do you know what we're talking about?

20 A. Page 3?

21 Q. Top of Page 3 on this Exhibit 8. There is an  
22 Exhibit A.

23 A. Okay.

24 Q. Do you know what e-mail we are talking about? I  
25 want to make the record clear.

1           A.    Do you have A with you?

2           Q.    This would be -- I'm showing the deponent earlier  
3           exhibit referred to as Exhibit A.

4           A.    Yes.

5           Q.    All right.  I am showing you Exhibit No. 3  
6           previously marked to the July deposition.  Can you please  
7           take a look.

8           A.    Okay.  (Witness peruses document.)

9           Q.    So we will refer to this as the 885 patent.

10          A.    Okay.

11          Q.    Does that patent depict the enclosure product  
12          that's the subject of the litigation that bears the Metal  
13          Gear trademark?

14               MR. OLSON:  I'm going to object that it's vague  
15          and unclear because first off there isn't any litigation  
16          going on in the TTAB.  And, second, the question is  
17          unclear as to whether you are talking about does this  
18          depict all of the product bearing the Metal Gear that is  
19          referenced to in Exhibit 2 or just this one particular  
20          model?

21          BY MR. LEE:

22          Q.    Are you able to answer?

23          A.    No.

24          Q.    Okay.  Have you seen this patent before?

25          A.    Yes.

1 Q. When was the first time you saw this patent?

2 A. When I asked them to file the patent quickly.

3 Q. "Them" referring to?

4 A. When we designed the products.

5 Q. You asked whom to file --

6 A. Anderson.

7 Q. And give me the date. You said when you asked

8 them to file. Give me the date.

9 A. 2002, end part of 2002 before the shipment get to

10 us.

11 Q. So do you understand generally what this patent

12 described?

13 A. Of course.

14 Q. If someone makes a product pursuant to the

15 teaching in this patent, it would be the enclosure product

16 that you guys are selling?

17 MR. OLSON: Well, I'm going to object. Calls for

18 a legal conclusion as to him, and it's vague and unclear

19 as to what you mean by "teaching."

20 BY MR. LEE:

21 Q. Are you able to answer?

22 A. No.

23 Q. All right. Do you think the patent depicts the

24 enclosure product that DAT is selling, at least some part

25 of the DAT products?

1           A.    Can you rephrase that?

2           Q.    Looking at Page 1 of this Exhibit 3, would DAT

3           call that an enclosure product?

4           A.    Yes.

5           Q.    Did you have any input to the filing of this

6           patent application?

7           A.    Yes.

8           Q.    Without your input, would you think Mr. Chia-Jen

9           Wang -- that is Anderson Wang.   Right?

10          A.    Yes.

11          Q.    Without your input, would you think that

12          Mr. Anderson Wang would be able to successfully file the

13          application and obtain the patent?

14               MR. OLSON:   Calls for speculation on his part.   I

15          will object.   No foundation.

16               THE WITNESS:   Hard to say.

17          BY MR. LEE:

18          Q.    Why do you make that statement, "Hard to say"?

19               MR. OLSON:   Well, it calls for speculation

20          because he has to think what could Mr. Wang, Anderson

21          Wang, be thinking in his mind.

22          BY MR. LEE:

23          Q.    Do you have anything else to add?

24          A.    No.

25          Q.    No?   Do you consider yourself an inventor of this

1 patent?

2 A. Part of it.

3 MR. LEE: I am marking Exhibit No. 9.

4 (A copy of the aforementioned document was  
5 marked by the court reporter as Opposer's  
6 Exhibit+ 9 for identification; attached hereto.)

7 BY MR. LEE:

8 Q. I will just direct your attention to Paragraph 1,  
9 the first two sentences, and Paragraph 3.

10 A. What page is that?

11 Q. Paragraph No. 1, the first two sentences in  
12 Paragraph 1, and Paragraph 3.

13 A. Okay.

14 (Witness peruses document.)

15 All right.

16 Q. Okay. So can you confirm Paragraph 1, the first  
17 two sentences, they are correct statements?

18 MR. OLSON: Calls for a legal conclusion on his  
19 part as to Sentence 2.

20 MR. LEE: We're talking about Lines 5, 6, 7, 8 in  
21 Paragraph 1.

22 MR. OLSON: Right.

23 BY MR. LEE:

24 Q. Can you confirm that they are factually correct?

25 A. The cross-complainant is me. Right? DAT?

1 Q. Right. This is DAT's cross-complaint against my  
2 client, Galaxy Metal Gear.

3 A. Uh-huh (indicating yes).

4 That's right. That's correct.

5 Q. And for Paragraph 3, that is factually correct?

6 A. What line is that?

7 Q. That would be on Page 3, Lines 8, 9, and 10.

8 A. Yes. That's correct.

9 Q. Okay. Does DAT consider Galaxy Metal Gear, Inc.,  
10 its competitor in enclosure business?

11 A. Yes.

12 Q. Does DAT consider Tech Depot -- now I think they  
13 changed their name to Tech Deal. Does DAT consider Tech  
14 Depot or Tech Deal its competitor in the enclosure  
15 business?

16 MR. OLSON: I'll object. It's beyond the scope  
17 of applicant's case and, therefore, improper rebuttal.

18 BY MR. LEE:

19 Q. You can answer.

20 A. No.

21 Q. You are saying you are not able to answer, or you  
22 refuse to answer?

23 A. Do I need to answer?

24 Q. Your counsel is stating an objection.

25 MR. OLSON: I am going to let you answer this

1 kind of insignificant question, but if you go beyond the  
2 scope of proper rebuttal, then I am going to stop the  
3 deposition. So be careful. Go ahead and answer the  
4 question.

5 THE WITNESS: Yes.

6 MR. LEE: I think the rule is you can state your  
7 objection, and unless there is some kind of privilege then  
8 the deponent should answer. But let's wait until that  
9 situation comes up.

10 MR. OLSON: That's not the case in regard to  
11 rebuttal.

12 MR. LEE: All right. I have nothing further.  
13 If you have anything on redirect.

14 MR. OLSON: Sure.

15

16 EXAMINATION +

17 BY MR. OLSON:

18 Q. Let me show you what we will mark as Exhibit 10.

19 (A copy of the aforementioned document was  
20 marked by the court reporter as Opposer's  
21 Exhibit+ 10 for identification; attached hereto.)

22 BY MR. OLSON:

23 Q. Can you identify that for the record?

24 A. Yes.

25 Q. And what is that?

1           A.    It's an enclosure bearing Metal Gear.

2           Q.    And that's one of the enclosures that you sell?

3           A.    Yes.

4           Q.    Is that identical to the first Metal Gear  
5 enclosure that you sold back in May 2003?

6           A.    Identical, but this one has light.

7           Q.    So the original or the first version that DAT  
8 sold is different than what's depicted in Exhibit 10?

9           A.    Yes.

10          Q.    And referring to the patent which was marked  
11 as --

12               MR. LEE:  It was previously marked.

13          BY MR. OLSON:

14          Q.    -- previously marked Exhibit 3, can you show me  
15 or tell me the date that that patent was issued?

16          A.    January 31, 2006.

17          Q.    So that was issued some three years after DAT  
18 first began selling enclosures.  Right?

19          A.    Yes.

20          Q.    Now, what's your understanding, if you have any,  
21 as to what particular features this patent covers?

22          A.    The patent on Exhibit 3 is using a thumbscrew to  
23 secure the hard drive on top of the plate.  And then they  
24 also have a light which is built inside enclosure to  
25 reflect the light, blinking light for the hard drive



1 access.

2 Q. So the first Metal Gear enclosure you were  
3 selling back in May 2003, did it have the blinking light  
4 that's the subject of the patent?

5 A. Yes.

6 Q. And did it have the thumbscrew?

7 A. Yes.

8 Q. So does this patent -- wait. Let me reask the  
9 question. Referring back to 10, it has a light. Right?

10 A. Yes.

11 Q. Was that light in the first enclosure you sold  
12 with Metal Gear back in May of 2003?

13 A. No.

14 Q. Okay. Is that light that's depicted in  
15 Exhibit 10 the light that's referred to in this patent?

16 A. No.

17 Q. What is the difference between the product  
18 described in Exhibit No. 3, the patent, and the first  
19 enclosure you were selling back in May 2003?

20 A. Can you repeat that again?

21 Q. Is there any difference in the enclosure you were  
22 selling in May of 2003 and the enclosure that's described  
23 in the patent?

24 A. No.

25 Q. Have you sold other enclosures bearing Metal Gear

1 without the hard drive -- strike that. Have you sold  
2 other enclosures bearing Metal Gear without thumbscrews?

3 A. Yes.

4 Q. Have you sold other enclosures with Metal Gear  
5 without the light that's the subject of the patent?

6 A. Yes.

7 Q. When did you start selling those?

8 A. Do you refer to 3 1/2 inch or 5 1/4 inch?

9 Q. First any one with Metal Gear.

10 A. 2003, after 2003 May.

11 Q. After May of 2003.

12 A. Right. Other manufacturers we bring in is after  
13 May.

14 Q. So if I understand correctly, at the same time  
15 that DAT was buying enclosures from DataStor, they were  
16 buying enclosures from other manufacturers.

17 A. Yes.

18 Q. And how many other manufacturers?

19 A. Three.

20 Q. And does DAT manufacture its own enclosures?

21 A. No, not at that time.

22 Q. No. I mean at any time since May 2003 to the  
23 present.

24 A. Yes.

25 Q. When did they start manufacturing their own

1       enclosures?

2           A.    2005.

3           Q.    To your knowledge, does this patent cover  
4       anything other than the actual construction of the  
5       enclosure?

6           A.    No.

7           Q.    Is there any mention of Metal Gear in this  
8       patent, to your knowledge?

9           A.    No.

10          Q.    To your knowledge, has DataStor ever filed a  
11       trademark application for Metal Gear?

12          A.    No.

13          Q.    So would it be fair to say that since May of 2003  
14       you have sold DataStor -- strike that.  Would it be fair  
15       to state since May of 2003 DAT has sold enclosures bearing  
16       Metal Gear which are similar to the ones described in the  
17       patent and also enclosures that are not similar to the  
18       ones described in the patent?

19          A.    Yes.

20               MR. OLSON:  That's all I have.

21

22                       FURTHER EXAMINATION +

23       BY MR. LEE:

24          Q.    I just have a very few follow-up.  On Exhibit  
25       No. 10, the enclosure depicted here, who is your supplier

1 of this enclosure?

2 A. For Exhibit 10 the supplier is DataStor.

3 Q. And you previously testified that DAT and  
4 DataStor stopped doing business around 2006?

5 A. '5 and '6, yes, around there.

6 Q. So starting in May of 2003 DataStor supplied the  
7 Metal Gear enclosure to DAT for DAT to sell in the United  
8 States. At that time was there other supplier of Metal  
9 Gear enclosures to DAT?

10 A. Of course.

11 Q. Who are other suppliers?

12 A. Maxnice, M-a-x-n-i-c-e. Then we have Jetyo,  
13 J-e-t-y-o. Then we have EMEC.

14 Q. But the earliest batch of the Metal Gear  
15 enclosures, we're talking about May of 2003, DAT obtained  
16 those from DataStor. Is that a correct statement?

17 A. Yes.

18 Q. Then starting when did the second or third  
19 supplier come in to supply the Metal Gear enclosure?

20 A. Four months.

21 Q. About four months later?

22 A. Yeah.

23 Q. All right.

24 MR. OLSON: Nothing further.

25 MR. LEE: Let's do the last stip we had and

1 change it to ten days review.

2 We will submit today's deposition and all the  
3 exhibits into evidence. We will stipulate that the court  
4 reporter be relieved under the Code, and counsel for  
5 deponent will receive the original transcript and keep  
6 custody and possession for deponent's review in ten days.  
7 And then if the original is lost or unavailable, then a  
8 certified copy can be used for all purposes.

9 THE REPORTER: Do you want a copy, Counsel?

10 MR. OLSON: No. I don't need a copy. Thanks.

11 (Proceedings concluded at 10:34 a.m.)

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DECLARATION

I hereby declare I am the deponent in the within matter; that I have read the foregoing deposition and know the contents thereof, and I declare that the same is true of my knowledge except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under the penalties of perjury of the State of California that the foregoing is true and correct.

Executed this                      day of                      ,  
200 , at                      , California.

PATRICK WANG

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REPORTER'S CERTIFICATE

I, Lyn Corrin Aaker, a Certified Shorthand Reporter, holding a valid and current license issued by the State of California, CSR No. 6228, do hereby certify:

That said proceedings were taken down by me in shorthand at the time and place therein set forth and thereafter transcribed into typewriting under my direction and supervision.

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my name on this 10th day of December, 2009.

Certified Shorthand Reporter





competently testify to the following.

2. DAT first began selling enclosures marked METAL GEAR in the United States on or about May 14, 2003 and is still selling the enclosures at this time. External hard drive enclosures are containers into which a hard drive is installed. A picture of DAT's product is attached as Exhibit "D." The enclosure is then attached to a computer via a USB or other connector. Computer files can be stored on the hard drive in the enclosure. The enclosure has no gears or any moving parts. Inside the container is a PC board which allows for communication between the hard drive and the computer, after the hard drive is installed into the enclosure.

3. DAT is the owner of the mark as I personally created the mark for use by DAT. At one time, DAT obtained its hard drive enclosures from Data Stor. Prior to my dealings with Data Stor, DAT was buying hard drive enclosures from another supplier. Some time prior to 2003 I was approached by Data Stor about buying products from them. Data Stor represented that it was looking to manufacture a new product. I investigated their product line and learned that Data Stor was not manufacturing hard drive enclosures. I advised Data Stor that DAT would buy hard drive enclosures from Data Stor if they could supply a product comparable to and at a better price than DAT's then supplier. I insisted that DAT receive exclusivity with respect to the U.S. territory, as I have had experience with other manufacturers selling our product to our competitors. Data Stor assured me that it would not sell hard drive enclosures to any other company in the United States and that DAT would have exclusivity in the U.S. market. A copy of email I received from Data Stor confirming

Opposition No. 91184213

DAT's exclusivity in the US is attached as Exhibit "A." DAT has not bought product from Data Stor since 2006 and since that date has manufactured METAL GEAR enclosures at Applicant's own factory. When DAT first consulted with Data Stor about Data Stor manufacturing enclosures for Applicant, an agreement was reached that Data Stor would not sell to any other company in the US under the METAL GEAR mark and that Applicant would have "exclusivity" on the product.

4. Opposer is owned, in part, by Garry Ching and Geoffrey Ching. These two individuals used to work for DAT. They left the company in 2004. While employed at DAT they became familiar with the products of DAT as well as its customers and suppliers, since they worked in the shipping and receiving departments. One former customer of DAT was a company called TechDepot. This company was secretly owned by Garry Ching and Geoffrey Ching while in the employ of DAT. Among the products sold to TechDepot were METAL GEAR hard drive enclosures. Later TechDepot began buying products direct from the supplier of DAT.

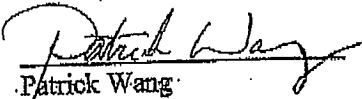
5. From time to time, during the course of my employment with Direct Access Technology, I would receive communication from customers who bought products of the Applicant and thought they were products of Direct Access Technology. Each instance involved a customer who complained about the quality of the Applicant's products. Sometimes the communication was by phone and sometimes by email. Direct Access Technologies has no records showing the number of calls from customers who contacted it complaining of Applicant's products.

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6. I authorized the filing of the application to register METAL GEAR as a trademark of DAT. I believed at the time the application to register the METAL GEAR application was filed by DAT that DAT was the owner of the METAL GEAR trademark for use on hard drive enclosures. I still believe that is true. It is my belief that anyone selling hard drive enclosures in the United States that did not originate with DAT is selling infringing products.

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Executed on February 8<sup>th</sup>, 2009 at City of Industry, California

  
Patrick Wang

Opposition No. 91184213

1 LAW OFFICES OF MICHAEL C. OLSON  
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Attorneys for Defendant and Cross Complainant  
4 DIRECT ACCESS TECHNOLOGY, INC.

5  
6  
7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES  
10

11 GALAXY METAL GEAR, INC., a California  
corporation;

12  
13 Plaintiff,

14 vs.

15  
16 DIRECT ACCESS TECHNOLOGY, INC., a  
California corporation;

17  
18 Defendants.

19 DIRECT ACCESS TECHNOLOGY, INC., a  
California corporation;

20  
21 Cross Complainant,

22 vs.

23  
24 GALAXY METAL GEAR, INC., a California  
corporation, and DOES 1-100 inclusive;

25  
26 Cross Defendant.  
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28

CASE NO. BC382375

[ASSIGNED TO THE HON. ANN I.  
JONES, DEPT. 40, FOR ALL  
PURPOSES]

CROSS COMPLAINT FOR: (1)  
VIOLATION OF 15 U.S.C. SECTION  
1126(a); (2) COMMON LAW  
TRADEMARK INFRINGEMENT; (3)  
DILUTION; (4) COMMON LAW  
UNFAIR COMPETITION; (5)  
UNFAIR COMPETITION -  
BUSINESS AND PROFESSIONS  
CODE SECTION 17200

EXHIBIT 9  
FOR IDENTIFICATION  
LYN CORRIAN AAKER, CSR  
WITNESS: P. Wang

1 Cross Complainant DIRECT ACCESS TECHNOLOGY, INC. as and for its Cross Complaint  
2 against the Defendant, alleges as follows:  
3

#### 4 INTRODUCTION

5 1. Since at least May 2003 Cross Complainant has been using the mark "METAL GEAR"  
6 on enclosures for external computer hard drives imported and distributed by it. Cross Complaint has  
7 a common law trademark in the mark "METAL GEAR" when used on enclosures for external computer  
8 hard drives. Cross Defendant GALAXY METAL GEAR is a competitor of Cross Complainant, and  
9 stole Cross Complainant's "METAL GEAR" trademark, without compensation, and placed "METAL  
10 GEAR," "GALAXY METAL GEAR" "METAL GEAR BOX" and "METAL GEAR BOX II" on its  
11 enclosures for external computer hard drives and other computer components and accessories, to break  
12 into this area and to gain a competitive advantage, thus embarking upon a nefarious scheme to capitalize  
13 upon and to usurp Cross Complainant's good name to enter into the marketplace, derive profits from its  
14 use, and to defraud and deceive consumers into believing that the Cross Defendant's goods are the Cross  
15 Complainant's. Cross Defendant has been palming off external hard drives and optical enclosure cases  
16 bearing the "METAL GEAR," "GALAXY METAL GEAR" "METAL GEAR BOX" and "METAL  
17 GEAR BOX II" marks, as Cross Complainant's "METAL GEAR" external computer hard drives. Cross  
18 Defendant's external computer hard drives are not imported or sold by Cross Complainant. The  
19 enclosures for external computer hard drives and optical enclosure cases being sold by Cross Defendant  
20 are, therefore, being sold fraudulently, illegally, and unfairly and are misleading consumers and retailers  
21 into believing they are imported and distributed by Cross Complainant. By their phony and misleading  
22 advertising and packaging, Cross Defendant is defrauding and deceiving consumers, as consumers are  
23 unable to discern the true importer or distributor, and are thus unable to obtain warranty and product  
24 information. The purpose of this complaint is to put an end to the evil scheme and stop the illegal,  
25 fraudulent and unfair practices employed by Cross Defendant in effectuating that scheme.  
26

27 2. Cross Defendant attempted to register the GALAXY METAL GEAR mark on the register  
28 with the United States Patent and Trademark Office. Cross Complainant opposed that registration on

1 the grounds that Cross Defendant did not own the mark and on the grounds that it was confusingly  
2 similar to Cross Complainant's mark. Recently Cross Defendant has abandoned the attempt at  
3 registration of the GALAXY METAL GEAR mark with prejudice. Accordingly, any and all limitations  
4 of action were equitably tolled during the period proceedings were pending before the United States  
5 Patent and Trademark Office.

### 6 7 THE PARTIES

8 3. Cross Complainant Direct Access Technology, Inc. ("DAT") is a California corporation  
9 with its principal place of business in the City of Industry, California. DAT is an importer and  
10 distributor of the METAL GEAR enclosures for external computer hard drives.

11  
12 4. Cross Complainant is informed and believes, and thereon alleges, that Cross Defendant  
13 GALAXY METAL GEAR, INC. is a citizen of the State of California being incorporated in that State  
14 and having its principal place of business in Brea, California, and at all times pertinent hereto was doing  
15 business in the State of California.

16  
17 5. The true names and/or capacities, whether individual, corporate, associate,  
18 co-conspirators or otherwise, of Cross Defendants Does 1 - 100, inclusive, are unknown to Cross  
19 Complainant, and Cross Complainant therefore sues these Cross Defendants by said fictitious names.  
20 Cross Complainant will seek to amend this Cross Complaint to show the true names and/or capacities  
21 of these Cross Defendants when this information has been ascertained. Cross Complainant is informed  
22 and believes and thereon alleges that each of the Cross Defendants designated herein as Doe is legally  
23 responsible and liable in some actionable manner for the incidents, circumstances, events and/or  
24 happenings referred to herein and proximately caused the damages suffered by Cross Complainant as  
25 alleged herein, and/or is subject to relief sought by Cross Complainant.

26  
27 6. Cross Complainant is informed and believes and thereon alleges that all times mentioned  
28 herein, each Cross Defendant, including those named fictitiously herein, in addition to acting for himself,

1 herself, or itself and on his, her or its own behalf individually, are and were acting as the agent, servant,  
2 employee, representative, principal, partner, associate, joint venturer and/or co-conspirator of, and with  
3 a knowledge, consent and permission of, each and all of the other of said Cross Defendants and therein  
4 the course, scope and authority of said agency, service, employment, representation, partnership,  
5 association, joint venture, or conspiracy.

6  
7 **FIRST CAUSE OF ACTION**

8 **(15 U.S.C. 1125 (a))**

9 **for METAL GEAR - Lanham Act section 43(a) - unregistered mark**

10 7. Cross Complainant re-alleges and incorporates by reference the allegations in paragraphs  
11 1 through 6 as though fully set forth herein.

12  
13 8. At all material times herein, Cross Complainant has been and is engaged in the  
14 importation and interstate wholesale distribution and sale of enclosures for external computer hard  
15 drives.

16  
17 9. Cross Complainant displays its logo on the enclosures for external computer hard drives  
18 it sells and on advertising associated therewith. By virtue of advertising and sales, together with  
19 consumer acceptance and recognition, Cross Complainant's mark identifies Cross Complainant's  
20 enclosures for external computer hard drives only, and distinguishes them from enclosures for external  
21 computer hard drives imported and sold by others. Cross Complainant's mark has thus become and is  
22 a valuable asset symbolizing Cross Complainant, its quality enclosures for external computer hard  
23 drives, and its goodwill.

24  
25 10. The law prohibits the use and commercial advertising of any false or misleading  
26 description or statement of fact regarding the nature, characteristics, qualities or geographic origin of a  
27 person's goods.

1           11.   Cross Defendant, with actual notice, or at least constructive notice, of Cross  
2 Complainant's ownership of the trademark "METAL GEAR" has used the names "METAL GEAR,"  
3 "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" on its external  
4 computer hard drives, optical enclosure cases and other computer components and accessories. It has  
5 used the names in advertising, brochures, promotional materials, etc. for products which are not Cross  
6 Complainant's METAL GEAR devices.

7  
8           12.   By advertising, promoting, offering for sale and selling enclosures for external computer  
9 hard drives and other computer components and accessories under the names "METAL GEAR,"  
10 "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" and using  
11 brochures, decals, markings, materials and packaging with the "METAL GEAR," "GALAXY METAL  
12 GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" name thereon, in a conscious and  
13 deliberate attempt to simulate Cross Complainant's distinctive mark and name with the deliberate intent  
14 to obtain market acceptance for Cross Defendant's products based on the merit, reputation and goodwill  
15 built up over many years by Cross Complainant in conjunction with its enclosures for external computer  
16 hard drives, Cross Defendant has used, in commerce, the "METAL GEAR," "GALAXY METAL  
17 GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" marks in a manner likely to cause  
18 confusion, or to cause mistake, or to deceive or misrepresent the nature, characteristics, qualities, or  
19 geographic origin of its and/or Cross Complainant's enclosures for external computer hard drives in  
20 violation of 15 U.S.C. section 1125(a).

21  
22           13.   On information and belief, Cross Defendant's conduct is deceptive and likely to cause  
23 confusion and create misleading and mistaken perceptions regarding Cross Complainant's and Cross  
24 Defendant's products. These activities constitute unfair business practices. Furthermore, Cross  
25 Defendant is palming off its product as if it were the product imported and distributed by Cross  
26 Complainant. Such palming off constitutes unfair business practices.



1           14.     As a result of the sales and advertising by Cross Complainant under the METAL GEAR  
2 trademark, the mark has developed and now has a secondary and distinctive trademark meaning to  
3 potential purchasers in California, in that potential purchasers in California have come to associate  
4 enclosures for external computer hard drives bearing the mark with Cross Complainant. As a result of  
5 this association, Cross Defendant's use of Cross Complainant's mark is likely to cause confusion or  
6 mistake or to deceive the public as to the source of origin of enclosures for external computer hard drives  
7 imported, distributed, sold, or offered for sale by Cross Defendant.

8  
9           15.     On information and belief, these advertisements and statements are material and likely  
10 to influence, and have influenced, purchasing decisions of consumers and retailers.

11  
12           16.     Despite Cross Complainant's requests to the contrary, Cross Defendant have failed and  
13 refused, and continue to fail and refuse, to cease and desist from further use of the name "METAL  
14 GEAR," "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" on their  
15 external computer hard drives and optical enclosure cases.

16  
17           17.     As a proximate result of advantage accruing to Cross Defendant's businesses from Cross  
18 Complainant's good name, advertising, sales and consumer recognition, and as proximate result of the  
19 confusion, mistake, deception and a combination thereof, caused by Cross Defendant's wrongful  
20 advertising and sale of their goods as herein alleged, bearing the "METAL GEAR," "GALAXY METAL  
21 GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" Cross Defendant has made substantial  
22 sales and/or profits in an amount to be determined at trial.

23  
24           18.     As a proximate result of advantage accruing to Cross Defendant's business from Cross  
25 Complainant's nationwide and international name recognition, advertising, sales and consumer  
26 recognition, and as a proximate result of confusion, deception, mistake and a combination thereof caused  
27 by Cross Defendant's wrongful advertising and sale of their goods as alleged above bearing the name  
28 "METAL GEAR," "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX

9-6 W

1 If" Cross Complainant has been deprived of the value of its mark as a commercial asset in an amount  
2 to be determined at trial.

3  
4 19. The wrongful conduct of Cross Defendant as described herein, including their false and  
5 misleading advertising and packaging of their external computer hard drives and computer components  
6 and accessories, its use in commerce of the METAL GEAR trademark, its acts of unfair competition,  
7 and its palming off constitute violations of the Lanham Act, 15 U.S.C. section 1125(a).

8  
9 20. This action by Cross Defendant constitutes an exceptional case under 15 U.S.C. section  
10 1117(a).

11  
12 21. Cross Complainant has been damaged by Cross Defendant's wrongful conduct in an  
13 amount to be determined at trial.

14  
15 22. On information and belief, Cross Defendant has wrongfully acquired sums by means of  
16 such false and misleading advertising.

17  
18 23. Because of Cross Defendant's Lanham Act violations, Cross Complainant has been  
19 irreparably harmed, and will continue to suffer irreparable harm unless Cross Defendant is enjoined from  
20 continuing the wrongful conduct described herein.

21  
22 **SECOND CAUSE OF ACTION**

23 **(Common Law Trademark Infringement)**

24 24. Cross Complainant re-allege and incorporate herein by reference the allegations in  
25 paragraphs 1 through 23 as though fully set forth herein.

26  
27 25. This cause of action arises under the common law prohibition of trademark infringement.

1           26.     Cross Complainant has used the trademark "METAL GEAR" since at least 2003 to  
2 identify and distinguish the enclosures for external computer hard drives that it imports, distributes, sells,  
3 and offers for sale in California and elsewhere from those imported, distributed, sold, and offered for  
4 sale by others, by, among other things, prominently displaying them on its enclosures for external  
5 computer hard drives. In addition, Cross Complainant has prominently displayed the mark on  
6 advertisements in trade magazines and wherever METAL GEAR products are offered for sale.

7  
8           27.     As a result of the sales and advertising by Cross Complainant under its trademark, the  
9 mark has developed and now has a secondary and distinctive trademark meaning to potential purchasers  
10 in California and elsewhere, in that potential purchasers in California and elsewhere have come to  
11 associate enclosures for external computer hard drives bearing the mark with Cross Complainant. As  
12 a result of this association, Cross Defendant's use of Cross Complainant's mark is likely to cause  
13 confusion or mistake or to deceive the public as to the source of origin of external computer hard drives  
14 and other computer components and accessories imported, distributed, sold, or offered for sale by Cross  
15 Defendant.

16  
17           28.     The aforesaid acts of Cross Defendant have violated and infringed upon the ownership  
18 rights of Cross Complainant as the owner of the trade names "METAL GEAR" in direct violation of  
19 California common law prohibiting trademark infringement.

20  
21           29.     As a proximate result of the conduct of Cross Defendant, and each of them, Cross  
22 Complainant has been damaged by Cross Defendant's wrongful conduct in an amount to be determined  
23 at trial.

24  
25           30.     Because of Cross Defendant's acts, Cross Complainant has been irreparably harmed, and  
26 will continue to suffer irreparable harm, unless Cross Defendant is restrained from their acts of  
27 wrongdoing.

31. The conduct of Cross Defendant as set forth herein, is and has been despicable, has been done with conscious disregard of Cross Complainant's rights or with the intention of depriving Cross Complainant of property or legal rights, or otherwise constituted oppression fraud or malice under California Civil Code sections 3288 and 3294, thereby entitling Cross Complainant to punitive or exemplary damages in an amount sufficient to punish or set an example of the Cross Defendant, and entitling Cross Complainant to prejudgment interest.

### THIRD CAUSE OF ACTION

(Dilution)

(Business and Professions Code section 14330)

32. Cross Complainant re-alleges and incorporates herein by reference the allegations in paragraphs 1 through 31 as though fully set forth herein..

33. This cause of action is for dilution of the distinctive quality of the mark "METAL GEAR" and injury to business reputation pursuant to California Business and Professions Code section 14330.

34. Through Cross Defendant's use and advertisement of the "METAL GEAR," "GALAXY METAL GEAR" and "METAL GEAR II" trademarks on their external computer hard drives, there exists a likelihood of injury to the business reputation of Cross Complainant and a likelihood of dilution of the distinctive quality of Cross Complainant's "METAL GEAR" trademark in violation of Business and Professions Code section 14330.

35. As a proximate result of Cross Defendant's conduct, Cross Complainant has been damaged in an amount to be determined at trial.

36. Because of Cross Defendant's acts, Cross Complainant has been irreparably harmed, and will continue to suffer irreparable harm, unless Cross Defendant is restrained from their acts of wrongdoing.



1 California Civil Code sections 3288 and 3294, thereby entitling Cross Complainant to punitive or  
2 exemplary damages in an amount sufficient to punish or set an example of the Cross Defendant, and  
3 entitling Cross Complainant to prejudgment interest.

4  
5 **SIXTH CAUSE OF ACTION**

6 **(Unfair Competition)**

7 **(Business and Professions Code section 17200)**

8 42. Cross Complainant re-alleges and incorporates herein by reference the allegations in  
9 paragraphs 1 through 41 as though fully set forth herein.

10  
11 43. Cross Defendant's wrongful conduct as described in the foregoing paragraphs constitutes  
12 statutory unfair competition under Business & Professions Code section 17200, *et seq.*

13  
14 44. On information and belief, Cross Defendant has wrongfully placed the marks "METAL  
15 GEAR," "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" on their  
16 external computer hard drives and other computer components and accessories and acquired sums of  
17 money by means of such unfair competition, in violation of Business & Professions Code section 17200,  
18 *et seq.*

19  
20 45. As a proximate result of Cross Defendant's conduct, Cross Complainant has been  
21 damaged in an amount to be determined at trial. Because of Cross Defendant's acts of unfair  
22 competition, Cross Complainant has been irreparably harmed, and will continue to suffer irreparable  
23 harm unless and until Cross Defendant is restrained from their acts of unfair competition.

24  
25 **WHEREFORE, Cross Complainant prays for judgment that:**

26 1. Cross Complainant be awarded under 15 U.S.C. section 1117 damages sustained by Cross  
27 Complainant, and all of Cross Defendant's profits in an amount to be proven at trial, together with costs  
28 of this action;

1           2.       That the Lanham Act damages awarded Cross Complainant be increased up to three times  
2 the amount found or assessed under, *inter alia*, 15 U.S.C. section 1117(a).

3  
4           3.       That Cross Complainant be awarded its reasonable attorneys' fees against Cross  
5 Defendant under, *inter alia*, 15 U.S.C. section 1117 (a).

6  
7           4.       That Cross Defendant and all of their officers, agents and employees and all other persons  
8 in active concert or participation with them receive actual notice of the injunction by personal service  
9 or otherwise, be preliminarily and permanently enjoined from (a) using the "METAL GEAR,"  
10 "GALAXY METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" trademark and/or  
11 any other confusingly similar mark to the METAL GEAR mark owned by Cross Complainant; and (b)  
12 unfair, deceptive, fraudulent and unlawful acts and all other acts of unfair competition;

13  
14           5.       For an order requiring Cross Defendant to deliver up and destroy all infringing materials,  
15 including but not limited to all products bearing "METAL GEAR," "GALAXY METAL GEAR,"  
16 "METAL GEAR BOX" and "METAL GEAR BOX II" marks, all advertising brochures, manuals,  
17 letterhead, tapes, videos or any other documentation bearing the "METAL GEAR," "GALAXY  
18 METAL GEAR," "METAL GEAR BOX" and "METAL GEAR BOX II" names;

19  
20           6.       That Cross Complainant be awarded damages in an amount to be proven at trial as a  
21 result of Cross Defendant's wrongdoing.

22  
23           7.       That Cross Complainant be awarded restitution pursuant to California Business &  
24 Professions Code section 17203 for all sums wrongfully acquired by Cross Defendant by means of the  
25 unfair competition in which it has engaged;

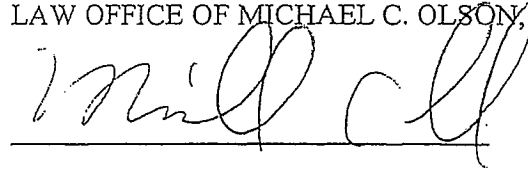
26  
27           8.       That Cross Complainant be awarded punitive or exemplary damages in an amount  
28 sufficient to punish or set an example of Cross Defendant;

1           9.     That Cross Complainant be awarded/granted prejudgment interest on all damages  
2 awarded to Cross Complainant; and

3  
4           10.    That Cross Complainant be awarded such other and further relief as the court determines  
5 is just and proper.

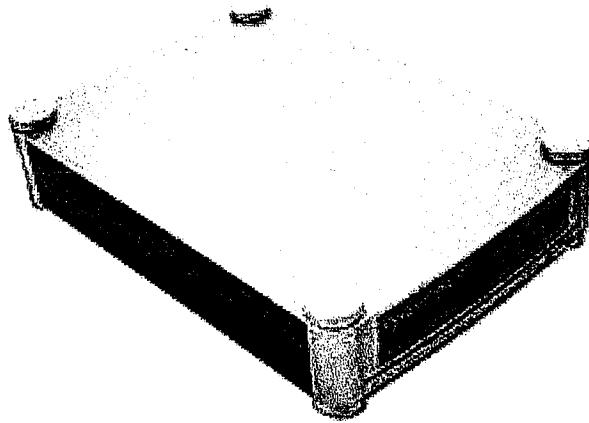
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7 Dated: April 4, 2008

LAW OFFICE OF MICHAEL C. OLSON, P.C.

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9 

10 Michael C. Olson, Esq.  
11 Attorney for Defendant and Cross Complainant DIRECT  
12 ACCESS TECHNOLOGY, INC  
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00046 EXHIBIT 10  
FOR IDENTIFICATION  
LYN CORRIN AAKER, CSR  
WITNESS: 12/1/04  
V. Wemy